ROWSTEAD SYSTEMS SDN BHD

v.

BUMICRYSTAL TECHNOLOGY (M) SDN BHD

COURT OF APPEAL, PUTRAJAYA
RICHARD MALANJUM JCA
TENGKU BAHARUDIN SHAH JCA
AZMEL MAAMOR J
[CIVIL APPEAL NO: D-02-427-2004]
28 FEBRUARY 2005

CIVIL PROCEDURE: *Stay of proceedings - Special circumstances - Interim application pending hearing of appeal - Whether case came within meaning of special circumstances - Whether more expedient to allow a stay until hearing of appeal has been completed*

The defendant had applied for the judicial commissioner (JC) to recuse himself from hearing the case matter because he was once the legal adviser for the United Malay National Organisation (UMNO) and had acted as counsel for UMNO in previous proceedings against Parti Islam Malaysia (PAS). It was the defendant's argument that since the defendant was owned by PAS-led government of the State of Kelantan, there would be a possibility of bias. The JC had ruled that there were no merits in the application and made the decision not to recuse himself. Hence, the defendant lodged an appeal against that decision and in the meantime, before this court, applied by way of a notice of motion for a stay of the proceedings of the said matter pending the decision of the appeal.

Held (allowing the application for stay)
Per Azmel Maamor J delivering the judgment of the court:

[1] When a party alleged that a presiding judge was biased, and if the presiding judge himself decided that he was not, would such decision not infringe the rule of natural justice in that 'one should not be a judge in one's own cause'? This was the crux of the instant case, even more so when the JC would have to decide on the degree of bias that would be sufficient to affect his impartiality. Hence, this situation came within the meaning of special circumstances. (p 471 b-c)

[2] In the event that a stay of proceedings was not granted and the JC be allowed to proceed with the hearing of this case, it would result in a waste of time and effort by all persons involved since if the Court of Appeal allowed the appeal, the whole proceedings conducted by the JC would have to be completely expunged. It would be more expedient to allow a stay of the proceedings until the hearing of the appeal had been completed. (p 471 d)

*[**Bahasa Malaysia** Translation Of Headnotes*

Defendan telah memohon supaya pesuruhjaya kehakiman ('JC') menarik diri dari mendengar kes/halperkara oleh kerana beliau dahulunya merupakan penasihat undang-undang kepada Pertubuhan Kebangsaan Melayu Bersatu ('UMNO') dan telah bertindak sebagai peguam UMNO dalam prosiding terdahulu terhadap Parti Islam SeMalaysia ('PAS'). Menjadi hujah defendan bahawa, oleh kerana defendan dimiliki oleh Kerajaan Negeri Kelantan yang diterajui oleh PAS, maka kemungkinan wujud sikap berat sebelah tidak boleh diketepikan. JC memutuskan bahawa hujah defendan adalah tidak bermerit, dan dengan itu mengambil keputusan untuk tidak mengundur diri. Defendan merayu ke mahkamah ini, dan berikutnya, melalui notis usul, memohon penggantungan prosiding halperkara sementara menanti keputusan rayuan.

Diputuskan (membenarkan permohonan penggantungan)
Oleh Azmel Maamor H menyampaikan penghakiman mahkamah:

[1] Apabila satu pihak mendakwa bahawa hakim bersidang berat sebelah, dan hakim bersidang tersebut memutuskan bahawa ia tidak begitu, tidakkah keputusan itu melanggar kaedah keadilan asasi dalam ertikata "seseorang tidak harus menjadi hakim untuk kepentingannya sendiri"? Inilah intipati kes semasa, sementelah pula apabila JC harus memutuskan apakah tahap berat sebelah yang mencukupi untuk menggugat sikap adilnya. Keadaan ini jelas dirangkumi oleh maksud halkeadaan istimewa.

[2] Jika sekiranya penggantungan prosiding tidak dibenarkan dan JC dibenarkan untuk meneruskan perbicaraan kes, ia tentunya akan mensia-siakan masa dan tenaga semua yang terlibat oleh kerana, jika Mahkamah Rayuan membenarkan rayuan, keseluruhan prosiding yang telah dijalankan oleh JC terpaksa dibatalkan. Adalah lebih berguna untuk membenarkan penggantungan prosiding sehinggalah pendengaran rayuan disempurnakan.

Case(s) referred to:

Kosma Palm Oil Mill Sdn Bhd v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(refd)***

See Teow Guan Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 CA ***(refd)***

Serangoon Garden Estate Ltd v. Ang Keng [1953] MLJ 116 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 44(1)

For the appellant - Subayogan (Raja Aziz Addruse with him); M/s Zainal Abidin & Co

For the respondent - Suraeisan ST Mani; M/s Suraeisan ST Mani & Assoc

[Appeal from High Court, Kota Bharu; Originating Summons No: 24-204-2002]

Reported by Suhainah Wahiduddin

JUDGMENT

Azmel Maamor J:

This matter originated from the decision of the learned senior assistant registrar on an interlocutory matter against which both parties had lodged an appeal to the judge in chamber. However the learned judge, having realised that one of the material documents in the case was an agreement which he, in his previous capacity as the Kelantan State Legal Adviser was responsible for drafting, decided to recuse himself from hearing this case.

Subsequently the learned Judicial Commissioner (JC) attached to the Kuantan High Court was administratively directed to hear this matter. However before the hearing commenced, the defendant applied for the learned JC to recuse himself from hearing this case. The main reason stated by the defendant for the application was that the learned JC was once the legal adviser for the United Malay National Organisation (UMNO) and had stood as UMNO candidate in the 1990 General Election. Furthermore the learned JC had acted as counsel for UMNO in previous proceedings against Parti Islam Malaysia (PAS). Since the defendant is owned by PAS-led Government of the State of Kelantan, there would be a possibility of bias if the learned JC were to hear the case.

In the light of such application the learned JC requested both parties to submit on whether he should recuse himself from hearing the case. After having heard the submissions the learned JC ruled that there were no merits in the application. In his view if he were to accede to the defendant's application it would "lead to a bizarre and ridiculous situation". He therefore decided not

to recuse himself from hearing the case as he completely believed he could conduct the case free of any bias whatsoever. Against that decision the defendant had lodged an appeal to this court. In the meantime before us the defendant/applicant applied by way of a notice of motion (encl. 3a) for a stay of the proceedings of the said matter pending the decision of the appeal. The prayers that the defendant sought read:

> (a) bahawa segala prosiding selanjutnya keatas Saman Pemula No. 24-204-2002 ini digantung sehingga Rayuan kepada Mahkamah Rayuan oleh pihak Defendan yang dibuat pada 16hb. Mei 2004 didengar dan diputuskan oleh Mahkamah Rayuan atas keputusan Mahkamah Tinggi yang dibuat pada 18hb. April 2004 berkenaan dengan Kandungan 64;
>
> (b) kos permohonan dijadikan kos dalam kausa;
>
> (c) apa-apa relif atau arahan/perintah yang difikirkan munasabah dan adil oleh Mahkamah Yang Mulia ini.

At the hearing before us it was admitted by the counsel for the defendant/applicant that they had not applied for stay of proceedings at the High Court. The application was made only at this court. The first question that we had to determine was whether this original application could be entertained by this court. The counsel for the applicant submitted that this court has the jurisdiction to hear this application by virtue of s. 44 of the Court of Judicature Act 1964.

Section 44 of the Court of Judicature Act 1964 (the said Act) states:

> 44 (1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of the parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.
>
> (2) Every application under subsection (1) shall be deemed to be a proceeding in the Court of Appeal.
>
> (3) Every order made under subsection (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed varied or discharged by the Court.

Based on the clear wording of s. 44(1) of the said Act we were fully satisfied that this court have the authority to entertain such application. An appeal against the decision of the learned JC is pending in this court. This is an interim application pending the hearing of the appeal. We therefore proceeded

to hear the application before us which was whether the application for stay of the proceedings be granted or otherwise. It is however a well established principle of law that the power of the court to grant a stay is completely discretionary.

In his grounds of judgment the learned JC had quite correctly stated that the law on disqualification (recuse) falls within two categories namely automatic disqualification and non-automatic disqualification.

In the automatic disqualification category, a judge is obliged to recuse *sua sponte* eg, where it is known or shown or brought to the judge's attention, that he has pecuniary or proprietary interest in the subject matter.

The second category, the non-automatic disqualification, is where the judge is not automatically obliged to recuse. In this case the applicant must prove bias and the bias must be sufficient to affect the impartiality of the presiding judge. The instant case comes within this category of disqualification.

It was the defendant's argument that the defendant company is owned by Perbadanan Menteri Besar Kelantan (PAS) and the plaintiff company is owned by Dato' Mohd. Bakri bin Mohd. And the learned JC should recuse himself because:

(i) both Dato' Mohd. Bakri Mohd. and the learned JC were senior members of UMNO Kelantan;

(ii) Dato' Mohd. Bakri is currently a senior personality in UMNO Kelantan and that he had not stated in his affidavit that he does not know the learned JC;

(iii) That the learned JC, prior to his elevation, was lead legal counsel and spokesmen for UMNO Kelantan and was perceived or could be perceived to be a duly authorised represen-tative of UMNO.

However, in insisting that there would be no likelihood of bias on his part, the learned JC disclosed the following facts to the counsels for both parties:

(a) that I did not hold any office in any political party since 1995, namely upon being elected as Chairman of the Kelantan Bar Committee and subsequently as an office bearer of the Bar Council. Section 46A(1)(c) of the Legal Profession Act 1976 prohibits me from holding any office in any political party;

(b) that I stood as a candidate for UMNO in the 1990 General Election is a situation that goes back to some 14 years ago;

(c) that the so-called post of legal adviser of Kelantan UMNO is not a post or office within the party's Constitution, and that in all cases I only acted as an advocate and solicitor for litigants who happened to be members of the party. I never acted for the party;

(d) that I do not have any idea or inkling as to who are the personalities in either the plaintiff's or the defendant's companies;

(e) that I do not have any association, be it social or political or any relationship or even acquaintance with any directors or shareholder of the plaintiff company.

(f) that I have not met or even knew by sight or spoken to any director or shareholder of the plaintiff company;

(g) that I have no knowledge of the Agreement or any agreement between the litigants, which is the subject matter of the case; and

(h) that my previous association with the said political party is already part of history, as in compliance with the Judges Code of Ethics, I ceased to be a member of any political party from the date of my appointment.

It is now a well established principle that in an application for a stay of proceedings the applicant must show the existence of special circumstances. This principle was originally adopted in the case of *Serangoon Garden Estate Ltd v. Ang Keng* [1953] MLJ 116. The Court of Appeal in the case of *See Teow Guan Ors. v. Kian Joo Holdings Sdn Bhd & Ors.* [1997] 2 CLJ 299 ruled that there is no need for the applicant to demonstrate special circumstances to warrant a stay of proceedings or of execution. However the recent Federal Court ruling in the case of *Kosma Palm Oil Mill Sdn Bhd v. Koperasi Serbausaha Makmur Bhd*. [2003] 4 CLJ 1 appears to have overruled the decision of *See Teow Guan* case and reinstate the principle that was established in the *Serangoon Garden Estate* case whereby the applicant still requires to show special circumstances in an application for stay of proceedings or execution. We are therefore bound by the ruling of the Federal Court. (See also the Court of Appeal decision in *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380).

As mentioned above, this case comes under the category of non-automatic disqualification. Hence the need to prove whether the element of bias exists. It has to be objectively decided, based on all the facts and circumstances of the case. But the more important question to be asked is whether it is proper for such decision to be made by the presiding judge against whom bias has been alleged? In other words, when a party alleges that a presiding judge is biased, and if the presiding judge himself decides he is not, would such decision not infringe the rule of natural justice in that "one should not be a judge in one's own cause". This, we think, is the crux of the instant case, even more so when the learned JC would have to decide the degree of bias that would be sufficient to affect his impartiality. In our judgment, this situation would come within the meaning of special circumstances.

We have also taken into consideration the fact that in the event that a stay a proceedings was not granted and the learned JC be allowed to proceed with the hearing of this case, it would result in a waste of time and effort by all persons involved since if the Court of Appeal allows the appeal the whole proceedings conducted by the learned JC would have to be completely expunged. In the circumstances it would be more expedient to allow a stay of the proceedings until the hearing of the appeal has been completed.

For the reasons stated above we unanimously allowed prayers (a) and (b) of encl. 3a.